No. 94-1207

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN C. MANDANICI, JR.,
Petitioner,

v.

TOWN OF MONROE,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Connecticut

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Is this action barred for lack of subject matter jurisdiction by virtue of Petitioner's failure to raise his constitutional claim at the time of the subdivision application approval process as opposed to this collateral attack instituted six years after the open space requirement was allegedly imposed?

2. Did the Superior Court of the State of Connecticut, and thereafter the Appellate Court of the State of Connecticut, err in holding and affirming, respectively, that Respondent did not violate the constitutional prohibition against taking private property without just compensation as a result of Petitioner's decision to deed to Respondent ten percent of his subdivision in accordance with Respondent's zoning regulations and municipal plan?

3. Did the Superior Court of the State of Connecticut, and thereafter the Appellate Court of the State of Connecticut, err by concluding that it was Petitioner rather than Respondent who bore the burden of proof on the issue of demonstrating a violation of the constitutional prohibition against taking property without just compensation where Petitioner never contested the open space requirement at the hearing on his subdivision application, never appealed the subdivision application insofar as it imposed an open space requirement, filed this counterclaim alleging a constructive trust, and never raised the issue of who bore the burden of proof either at trial or on appeal to the Appellate Court? Even if the burden was misplaced, was sufficient proof introduced by Respondent to satisfy the appropriate standard?

LIST OF PARTIES

Respondent is satisfied with Petitioner's representation as to the parties.

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RESPONDENT'S BRIEF IN OPPOSITION

REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

Respondent is satisfied with Petitioner's entry as to the official and unofficial reports of this case as reported below.

STATEMENT OF THE GROUNDS OF JURISDICTION

Respondent is satisfied with Petitioner's statement of the grounds for jurisdiction.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The following constitutional, statutory and regulatory provisions are in issue in this case:

1. The Fifth Amendment to the United States Constitution states:

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution states, in relevant part:

   Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Connecticut General Statutes Section 8-8(a) (1989) provides, in relevant part: [1]

   Any person or persons severally or jointly aggrieved by any decision of said board . . . may, within fiteen days from the date when notice of such decision was published in a newspaper pursuant to the provisions of section 8-3 or 8-7, as the case may be, take an appeal to the superior court for the judicial district in which such mu-

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[1] The full text of Connecticut General Statutes Section 8-8 is reproduced in the Appendix (hereinafter designated as "A") at 1a.

nicipality is located, which appeal shall be made returnable to said court in the same manner as that prescribed for civil actions brought to said court.

4. Connecticut General Statutes Section 8-23 (1989) states, in relevant part: [2]

> The commission shall prepare, adopt and amend a plan of development for the municipality. . . . The plan of development shall be a statement of policies, goals and standards for the physical and economic development of the municipality. . . . The plan shall be designed to promote with the greatest efficiency and economy the coordinated development of the municipality and the general welfare and prosperity of its people.

5. Connecticut General Statutes Section 8-25(a) (1989) provides, in relevant part: [3]

> No subdivision of land shall be made until a plan for such subdivision has been approved by the commission. . . . Before exercising the powers granted in this section, the commission shall adopt regulations covering the subdivision of land. . . . Such regulations shall also provide that the commission may require the provision of open spaces, parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces, parks and playgrounds shall be shown on the subdivision plan.

6. Connecticut General Statutes Section 8-26 (1989) provides, in relevant part: [4]

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[2] The full text of Connecticut General Statutes Section 8-23 is reproduced at A at 4a.

[3] The full text of Connecticut General Statutes Section 8-25 is reproduced at A at 6a.

[4] The full text of Connecticut General Statutes Section 8-26 is reproduced at A at 10a.

All plans for subdivisions and resubdivisions, including subdivisions and resubdivisions in existence but which were not submitted to the commission for required approval, whether or not shown on an existing map or plan or whether or not conveyances have been made of any of the property included in such subdivisions or resubdivisions, shall be submitted to the commission with an application in the form to be prescribed by it. The commission shall have the authority to determine whether the existing division of any land constitutes a subdivision or resubdivision under the provisions of this chapter, provided nothing in this section shall be deemed to authorize the commission to approve any such subdivision or resubdivision which conflicts with applicable zoning regulations.

7. Connecticut General Statutes Section 8-28(a) (1989) provides, in relevant part: [5]

   Except as provided in section 8-30, any person aggrieved by an official action or decision of a planning commission, including a decision to take no action, or any person owning land which abuts or is within a radius of one hundred feet of any portion of the land involved in any decision of a planning commission, may appeal therefrom, within fifteen days from the date when notice of such action or decision was so published, to the superior court for the judicial district within which the municipality with such planning commission lies.

8. Town of Monroe Subdivision Regulations 3.4 provides: [6]

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[5] The full text of Connecticut General Statutes Section 8-28 is reproduced at A at 12a.

[6] The full text of the Town of Monroe Subdivision Regulations 3.4 is reproduced at A at 17a..

Open Spaces: In subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission. Such open spaces shall be offered to and accepted by the Town. Land reserved for open spaces shall be of such size, location, shape, topography and general character as to be useful to satisfy the needs determined by the Commission. Proper pedestrian and vehicular access shall be provided for each such reservation. Reservation of land shall conform to any Town Master Plan pertaining to parks, playgrounds, recreation areas and open spaces.

The Commission in requiring the provision of open space shall consider the proper development of the Town, the density of population and existing public open spaces in the vicinity of the subdivision. No loam, fill or natural growth shall be removed from the area reserved for open space, and no foreign matter shall be permanently placed upon said space unless required by the Commission in connection with the grading, construction or development of the subdivision.

9. Town of Monroe Land Subdivision Regulations Preamble provides: [7]

In accordance with the provisions of Chapter 126 of the 1958 Revision of the General Statutes of the State of Connecticut, as amended, the Town Planning and Zoning Commission of the Town of Monroe, Connecticut, hereby adopts the following regulations as the Land Subdivision Regulations of the Town of Monroe. All prior regulations are hereby rescinded. These regulations apply to all land within the Town of Monroe. The purpose of these regulations is to provide that the land to be subdivided shall be of such

[7] The full text of the Town of Monroe Subdivision Regulations Preamble is reproduced at A at 15a.

character that it can be used for building purposes without danger to health or the public safety, that proper provision shall be made for water, drainage and sewage and, that the proper provision shall be made for protective flood control measures, and that the proposed streets are in harmony with existing or proposed principal thoroughfares in said town, especially in regard to safe intersections with such thoroughfares, and so arranged and of such width as to provide an adequate and convenient system for present and prospective traffic needs and fire safety, and to provide for open spaces for parks and playgrounds, for open spaces, for recreation, light and air.

STATEMENT OF THE CASE

The genesis of this action lies in two separate tax foreclosures filed by Respondent against Petitioner for back taxes owed by Petitioner. See Memorandum of Decision at 1, reproduced at A at 18a. Those tax foreclosures were later consolidated for purposes of trial and decision. *Id.* at 19a. The factual and legal issues concerning the tax foreclosures were stipulated to by the parties and are not at issue here. *Id.*

What is in issue concerns Petitioner's counterclaim in the consolidated action. Petitioner claimed that as the owner of a proposed ten-lot subdivision in the Town of Monroe, Connecticut (hereinafter "Town"), he was forced by duress and imposition to deed over to the Town 1.26 acres of that subdivision in order to secure the Town's approval for the subdivision. Respondent denied the basis of Petitioner's claim both factually and legally. The trial court, after full hearing and briefing by the parties, found in favor of Respondent on the counterclaim.

In 1977, Petitioner's partner, Lawrence Iannucci,[8] submitted a subdivision map to the Town Planning and Zon-

[8] Since Petitioner is bound by the actions of his partner, all actions taken by one or the other are attributed to Petitioner.

ing Commission for the Town of Monroe. *Id.* at 21a. The subdivision was for eleven lots, each of which was at least one acre. *Id.*

The map submitted by Petitioner specifically designated 1.26 acres as open space. *Id.* at 20a. This designation was consistent with Section 3.4 of the Monroe Land Subdivision Regulations (1976).

The submission of the parcel for open space by Petitioner was neither requested nor suggested by the Town. *Id.* It was done at Petitioner's offering, although presumably in response to the subdivision regulations. *Id.* at 21a.[9]

The open space designated by Petitioner represented approximately ten percent of the development. *Id.* That designation was consistent with Respondent's practice of requiring all developers of subdivisions of ten or more lots

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[9] Interestingly, Petitioner's proof on this issue was less than clear. His representative testified that the land chosen was designated "in order to give [the Town] as much as you could to get the Town's approval so the Town would like it. And the more you give . . . the Town, the more likely they are to approve the subdivision." (Testimony of Frank Mandanici, July 15, 1993). Petitioner has variously characterized this decision to give the land as "a normal expected business cost" (Defendant's Reply and Supplemental Brief, dated August 13, 1993, at 10, excerpt reproduced at A at 29a), as something that was "close to being a voluntary act in 1977 of offering the land in exchange for quick approval . . ." *Id.* at 11, excerpt reproduced at A at 30a), and as a means of getting "into the 'good graces' of the Plaintiff." (Defendant's Brief to Appellate Court, at 6, excerpt reproduced at A at 27a). Petitioner, however, apparently changed his mind sometime during the decade while his applications were pending. He asserts it "was no longer a voluntary act in 1986 when the land was deeded to the Town because the Court costs and cost of the delay of 9 years had caused a great loss in the project's profits and a donation of a $50,000 piece of land now took on much greater significance." (Defendant's Reply and Supplemental Brief, dated August 13, 1993 at 10, excerpt reproduced at A at 29a.) As noted *infra*, however, Petitioner never bothered to tell Respondent about this change of heart.

or of subdivisions of ten or more acres to dedicate approximately ten percent of the land as open space. *Id.* The land dedicated here was a non-conforming lot because of inadequate road frontage. *Id.* Petitioner could not have built on the non-conforming lot unless he obtained a zoning variance, which he never sought. *Id.*

Notwithstanding Petitioner's claim that the designated lot was provided in response to the duress and imposition imposed by the Town, the trial court held that not to be the case. *Id.* Rather, the trial court found that the designation had been made voluntarily both in the original map submitted in connection with Petitioner's first application in 1976 and in connection with the three resubmissions filed thereafter, including the fourth application which was approved in 1986. At no time during the entire ten-year period between 1976 and 1986 did Petitioner ever question the designation or object to designating the lot as open space. *Id.* In fact, this issue does not appear to have been discussed during the entire decade Petitioner's applications were under consideration.

The trial court further held that after the subdivision had been approved, the Town requested the deed through its attorney. *Id.* at 22a. Even then, the court stated, there was no duress or imposition. The Town Attorney was simply following the mandate of the regulations and requiring Petitioner to do that which his representative voluntarily said he would do before the Planning and Zoning Commission. *Id.* In short, there was no duress or imposition; there was simply Petitioner's offer of open space and Respondent's acceptance.

Petitioner asserted below that the regulation itself was unconstitutional because it did not substantially advance a legitimate town interest. He relied, in part, on the fact that the Town had not developed the deeded area into a park or playground. The trial court found no support in that argument. Turning to the Preamble and to Section 3.4 of the Subdivision Regulations, it noted that the Town

had specifically provided for open space requirements to satisfy the Town's salutary objective of providing parks and playgrounds, recreation, light and air for its residents. *Id.* at 22a.

The trial court specifically found that at least two of these provisions, light and air, were immediately met by virtue of the space having been deeded to the Town. *Id.* It further found that if and when the Town developed the space as a park or playground, the remaining objectives would be accomplished. *Id.* In fact, it intimated that the designated lot was, in essence, a passive park consistent, in fact, with the Town's "Plan of Development" which provided that it must look to and encourage "opportunities for passive and active recreation in locations accessible to residents and preservation of the ecological balance and exhaustible natural resources of the area [as] essential to the continued health and economic well-being of the community." *Id.* at 24a, quoting Monroe Plan of Development, at the section entitled Recreation and Open Space which section is reproduced at A at 31a. The court, therefore, held that the Town's legitimate state interests were substantially advanced through this regulation.[10]

On appeal, the Connecticut Appellate Court affirmed the trial court's judgment entered on behalf of Respondent by a decision issued on May 24, 1994. Thereafter, Petitioner filed a Motion for Reargument and Reconsideration, which motion was denied by the court on June 22, 1994. Thereafter, Petitioner filed a Motion for Reargument *En Banc*, which motion was denied on June 22, 1994. Thereafter, Petitioner filed a petition for certification to appeal

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[10] It should be noted that Connecticut authority regarding unconstitutional takings in situations like this are in accord with *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). *See Property Group, Inc. v. Planning and Zoning Comm'n*, 226 Conn. 684, 698, 628 A.2d 1277, 1284 (1993). (There must be "substantial evidence demonstrating" that the condition in issue "meet[s] the requirements of the [zoning regulations]" which, in turn, embody legitimate governmental interests.)

to the Supreme Court for the State of Connecticut, which petition was denied on October 13, 1994. Thereafter, this petition followed.[11]

SUMMARY OF ARGUMENT

Petitioner's claim in this matter is made solely on the basis of the Fifth and Fourteenth Amendments' provisions concerning takings without just compensation, in accordance with this Court's decision in *Dolan v. The City of Tigard*, 512 U.S. ——, 114 S. Ct. 2309, 129 L.Ed.2d 304 (1994), and its predecessor *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).[12] He further asserts that because the Town's action was unconstitutional, it must be deemed to be holding the property in constructive trust which must now be returned along with money damages. Respondent respectfully submits that Petitioner's argument is both factually and legally insupportable.[13]

A. Petitioner's Action Is Barred for Lack of Subject Matter Jurisdiction.

Respondent's first argument is that this Court lacks subject matter jurisdiction because Petitioner failed to raise his constitutional claim as part of the administrative appeals process in Connecticut which governs subdivision applications. Petitioner's collateral attack of the land dedication requirement via the counterclaim filed in this action is not in accord with *Upjohn Co. v. Planning and Zoning Comm'n*, 224 Conn. 96, 616 A.2d 793 (1992) and its progeny and the administrative procedure set forth

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[11] Petitioner has reproduced these pleadings and orders in his appendix. They are not reproduced here.

[12] Petitioner has not advanced in this petition any claim that the Constitution for the State of Connecticut has been violated.

[13] As noted, Petitioner has also made a passing argument that the trial court improperly placed the burden on him to prove the unconstitutionality of Respondent's conduct. Respondent has addressed that issue, as well.

in Connecticut General Statutes Section 8-28. Petitioner's challenge, if it were to be made at all, should have been made by way of appeal of the subdivision application approval insofar as it required a land dedication. Having failed to exercise that remedy, the Court is without subject matter jurisdiction to consider Petitioner's claim by way of collateral attack.

B. No Unconstitutional Taking Occurred in This Case.

Respondent's second argument is that neither *Nollan* nor *Dolan*, nor any other decision of this Court, requires a reversal of the decisions of the Connecticut Appellate and Superior Courts. In fact, *Nollan* and *Dolan* are inapposite to the pending appeal, both factually and legally.

First, Petitioner has not shown that his decision to dedicate the land was motivated by duress or imposition. Each of the four applications submitted by Petitioner between 1976 and 1986 contained the open space dedication. The trial court specifically found there was no duress or imposition, but simply a decision by Petitioner to voluntarily comply with a regulation for subdivisions of this nature. The trial court further found that at no point did Petitioner ever object to, challenge or refute the existence of the open space requirement. Thus without a factual prerequisite of duress or imposition having been demonstrated, this case is distinguishable from *Nollan, Dolan*, and their progeny.

Second, *Nollan* and *Dolan* are not controlling because the property deeded voluntarily by Petitioner substantially advanced a legitimate town interest and effectuated a substantial governmental purpose. The land dedication not only satisfied an immediate need of light and air, but also served as a passive park, which, if the Town so desired, could be developed into a park or playground.

Further, in addressing the second requirement of *Nollan*, the trial court found an essential nexus meeting the *Dolan*

"rough proportionality test" between the requirement of open space in the Town and the reason for that requirement. In subdivisions of more than ten lots or greater than ten acres, the Town's policy was to require a ten percent dedication. This percentage represented the proper allocation of space to meet the Town's desire to accommodate its ecological concerns as well as its need for light, air and possibly parks or playgrounds. The requirement was consistent with the Town's authority to grant or deny development plans as being consistent with the Town Plan. It is particularly applicable here inasmuch as the land in issue was a nonconforming lot, offered by Petitioner, which could not be approved for building unless a variance was sought.

C. The Burden of Proof Was Properly Assigned to Petitioner Given the Facts of This Case and, Even if It Were Not, Respondent Introduced Sufficient Evidence to Meet Its Burden.

Petitioner argues that *Dolan* places the burden of proof of satisfying the *Nollan/Dolan* test of constitutionality on the governmental entity. *Dolan* so holds. But, Petitioner never objected to the trial court's assignment of the burden of proof, and failed to raise the claim to the Appellate Court.

This case involves a claim that the Town holds the property in constructive trust on behalf of Petitioner; it is not a direct appeal of a municipal act as was involved in *Nollan* and *Dolan*. Petitioner chose to ignore that route and pursue his constructive trust theory for which he properly bears the burden of proof, particularly since he voluntarily chose to deed this property to the Town as far back as 1977 when he submitted his first application.

Furthermore, even if the court below erred in misassigning the burden of proof, Respondent introduced sufficient evidence to meet the *Dolan* "rough proportionality" test.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S ACTION IS BARRED FOR LACK OF SUBJECT MATTER JURISDICTION.

Petitioner's counterclaim in issue here was filed on June 26, 1992, more than fifteen years after Petitioner first submitted his subdivision application for zoning approval. In that first application, and without any request from the Town, Petitioner set aside ten perecnt of the property from that subdivision and reflected that set-aside on his map. The subdivision application was denied and appealed on three separate and successive occasions over the next decade. Each time the application was resubmitted, the ten percent set-aside was voluntarily included by Petitioner. At no time was Petitioner ever requested by the Town to reflect that set-aside on his map. In fact, the set-aside was never discussed until 1986, after the fourth application had been approved, when Respondent's agent requested a deed conveying the property to the Town. Even then, however, Petitioner did not challenge the act by any legal recourse, written objection or verbal challenge. In fact, Petitioner did not ever challenge the conveyance until it filed a counterclaim in 1992 in response to the Town's tax foreclosure.[14]

Petitioner has been quick to point out in his brief that Respondent has not made a laches defense in response to the claim of constructive trust. He is correct. However, that decision in no way impacts upon the infirmity of Petitioner's claim.

Petitioner never appealed the final decision granting his subdivision application which provided for the open space and with which he voluntarily complied. By failing

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[14] Furthermore, the record also is devoid of any mention by Petitioner that he ever appeared at any hearing or any Commission meeting in opposition to the Plan of Development which provided for open space or in response to the adoption of Zoning Regulations which provided for open space allocations in conjunction with subdivisions.

to exercise that remedy, he has waived his right to seek relief through this alternative.

In Connecticut, the rule is absolutely clear that all claims pertaining to a subdivision application granted or denied must be litigated as part of an administrative appeal. Under Connecticut General Statutes Section 8-28, a party aggrieved by the action of a planning and zoning commission in connection with a subdivision has the right to file an administrative appeal of such conduct. It is the only right. An aggrieved party may not collaterally attack a municipal act for which it has a statutory right to institute an administrative appeal. *Upjohn Co. v. Zoning Board of Appeals*, 224 Conn. 96, 102, 616 A.2d 793, 796 (1992) (construing parallel statutes, Conn. Gen. Stat. Section 8-8); *Butzgy v. Town of Glastonbury*, 203 Conn. 109, 122, 523 A.2d 1258, 1265 (1987) (construing Conn. Gen. Stat. Section 8-28). As stated by the Supreme Court of Connecticut, "[w]hen a party has a statutory right of appeal from the decision of an administrative agency, he may not, instead of appealing, bring an independent action to test the very issue which the appeal was designed to test." *Carpenter v. Planning and Zoning Comm'n*, 176 Conn. 581, 598, 409 A.2d 1029, 1037 (1979). This rule, "rest[s] in large part, at least in the zoning context, on the need for stability in land use planning and the need for justified reliance by all interested parties. . . ." *Upjohn Co.*, 224 Conn. at 102, 616 A.2d at 796. *Accord Spectrum of Conn., Inc. v. Planning and Zoning Comm'n*, 13 Conn. App. 159, 163, 535 A.2d 382, 384 (1988) *cert. denied*, 207 Conn. 804, 540 A.2d 373 (1988).

In the absence of a proper appeal under Connecticut General Statutes Section 8-28, the court has no subject matter jurisdiction. *Upjohn Co.*, 224 Conn. at 104, 616 A.2d at 797; *Butzgy*, 203 Conn. at 114 and 116, 523 A.2d at 1261 and 1262 (finding no jurisdiction to entertain collateral attack of zoning permits made subject to a condition which the applicant initially accepted but then

challenged three years later by way of collateral attack).[15] Simply stated, Petitioner's claim is barred because of his failure to raise it as part of the 1986 subdivision approval which was conditioned upon the land dedication.

In this regard the Court may take guidance from Justice Souter's opinion in *Town of Auburn v. McEvoy*, 553 A.2d 317 (1988) when he sat as a member of the New Hampshire Supreme Court. In that case, the court was confronted with a challenge to an open space requirement brought by a property owner requesting the return of a subdivision lot. The action was filed subsequent to the New Hampshire Supreme Court's decision in *J.E.D. Assoc's, Inc. v. Town of Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981), which held that the open space requirement in issue there was unconstitutional.

In *McEvoy*, the applicant went through the approval process without contesting the deed requirement. She then resurrected the issue subsequent to the *J.E.D. Assoc's* opinion by way of a declaratory judgment action. The trial court found in favor of the town on the basis of laches. On appeal, the town argued that the trial court not only correctly upheld its laches defense but also asserted that it was entitled to relief based on the fact that the applicant had failed to exhaust her administrative remedies.

The Supreme Court of New Hampshire held that "[b]y providing that any appeal from a planning board's decision or order must be brought within the thirty-day period, the legislature obviously expressed an intent to endue such an order with finality, at least insofar as the order applies a town's land use regulations in the particular instance." *McEvoy*, 553 A.2d at 319. Going further, it stated "[s]uffice it to say here . . . that the statutory

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[15] Subject matter jurisdiction is properly raised at any point in the litigation, including on appeal. *Park City Hosp. v. Comm'n on Hosp's. and Health Care*, 210 Conn. 697, 703, 556 A.2d 602, 605 (1989).

limitation on the availability of an appellate remedy will be rendered nugatory unless the failure to bring a timely appeal is held to bar a dissatisfied party from mounting a later attack on the order in question." *Id.* *See also Leroy Land Dev. v. Tahoe Regional Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991); *Xenia Rural Water Ass'n v. Dallas County*, 445 N.W. 2d 785, 788-89 (Iowa 1989). It overruled its holding in *J.E.D. Assoc's* which permitted a declaratory judgment action to be filed claiming an unconstitutional taking, separate and apart from an administrative appeal, and concluded that in the absence of an agreement to raise the constitutional claim at some later date or evidence of some written indication that the claim would be preserved by further litigation, there is no right to raise a separate claim. *See Town of Auburn v. McEvoy*, 553 A.2d at 321.[16]

II. NO UNCONSTITUTIONAL TAKING OCCURRED IN THIS CASE.

Nollan and *Dolan* and their progeny do not, as Petitioner argues, support his argument that the open space requirement in issue here was unconstitutional. This case is factually and legally distinguishable from those cases.

A. Current State of Law Concerning Unconstitutional Taking.

When confronted with a claim of unconstitutional taking, a court must determine whether the action at issue is a valid exercise of police power by the respective authority. *Nollan*, 483 U.S. at 836-37. Specifically, under *Nollan*, there must be an essential nexus between the condition imposed by the municipal regulation and the goal which is sought by the authority in imposing that conditon. *Id.* If that nexus does not exist, then the court must determine the use and value of the respective property

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[16] Even if this caveat of the *McEvoy* decision were controlling here, it is clear that Petitioner has not satisfied the exception.

for the purposes of determining just compensation. This case centers entirely on the first prong of the *Nollan* test.

The Supreme Court has "long recognized that [a] land-use regulation does not effect a taking if it 'substantially advance[s] a legitimate state interests' [sic] and does not 'den[y] an owner economically viable use of his land . . .'" *Nollan*, 483 U.S. at 834, quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The Court has recognized a wide-range of legitimate state interests which may be protected if the regulation in issue substantially advances that interest. *See Agins*, 447 U.S. at 260-262 (scenic zoning); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (residential zoning).

Under *Nollan*, a municipal authority may condition the grant of a permit on the exercise of some legitimate police power, provided that the municipal authority could have denied the permit if the interest which was to be satisfied by the condition would have been a proper reason for denial. *Nollan*, 483 U.S. 836. *Nollan*, in fact, states that a municipal authority may even impose a requirement on a land owner to satisfy a state interest as part of a development permit, even though the imposition of that condition outside the permit process might have constituted a taking. *Id.* at 834.

Dolan addressed the issue left undecided in *Nollan*, to wit, what degree of connection must exist to satisfy the essential nexus test enunciated in *Nollan* between the exactions [imposed by the regulation] and the projected impact of the proposed development. *Dolan*, 129 L.Ed. 2d at 317. It adopted what it called the rough proportionality test. Speaking for the court, Chief Justice Rehnquist stated "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 320.

B. Connecticut's Regulatory and Subdivision Approval Processes.

In Connecticut, a town's authority to approve a subdivision is vested with the local planning and zoning commission. *See* Conn. Gen. Stat. § 8-26. *See also, Thoma v. Planning and Zoning Comm'n*, 31 Conn. App. 643, 647, 626 A.2d 809, 811 (1993), *cert. granted in part* 227 Conn. 910 (1993). To fulfill its duty, a planning and zoning commission must examine the application and ensure that it conforms to the regulations which govern the awarding of subdivision approvals. *See Reed v. Planning and Zoning Comm'n*, 208 Conn. 431, 433, 544 A.2d 1213, 1214, (1988). A commission which finds that a proposed subdivision does not conform with the applicable zoning regulations may either deny the application or impose certain conditions upon its approval. *Timber Trails Corp. v. Planning & Zoning Comm'n*, 222 Conn. 380, 388, 610 A.2d 620, 624 (1992).

Under Connecticut General Statutes Section 8-23, a town is also vested with the authority to prepare a "plan of development for the municipality." *See Conn. Gen. Stat.* § 8-23. The municipal plan contemplated by Section 8-23 is of broader significance than the zoning regulations. *See Forest Constr. Co. v. Planning and Zoning Comm'n*, 155 Conn. 669, 677, 236 A.2d 917, 922 (1967). "Municipal planning is designed to promote, with the greatest efficiency and economy, the coordinated development of the municipality and the general welfare and prosperity of its people. . . . Its aim is to secure the uniform and harmonious growth of villages, towns and cities." *Kiska v. Skrensky*, 145 Conn. 28, 32, 138 A.2d 523, 525 (1958). While the plan does not control a commission in the enactment of zoning regulations, it does act as an interpretive tool. *Smith v. Zoning Bd. of Appeals*, 227 Conn. 71, 88, 629 A.2d 1089, 1099 (1993); *Levinsky v. Zoning Comm'n*, 144 Conn. 117, 123, 127 A.2d 822, 826 (1956).

The Town, through its applicable municipal authorities, has passed land subdivision regulations. Section 3.4 of the Monroe Land Subdivision Regulations provides as follows:

> *Open Spaces*: In subdivisions proposed for residential development, open spaces for parks and playgrounds shall be provided in places deemed proper by the Commission. Such open spaces shall be offered to and accepted by the Town. Land reserved for open spaces shall be of such size, location, shape, topography and general character as to be useful to satisfy the needs determined by the Commission. Proper pedestrian and vehicular access shall be provided for each such reservation. Reservation of land shall conform to any Town Master Plan pertaining to parks, playgrounds, recreation areas and open spaces.
>
> The Commission in requiring the provision of open space shall consider the proper development of the Town, the density of population and existing public open spaces in the vicinity of the subdivision. No loam, fill or natural growth shall be removed from the area reserved for open space, and no foreign matter shall be permanently placed upon said space unless required by the Commission in connection with the grading, construction or development of the subdivision.

As Zoning Regulation 3.4 specifically provides, the reservation of land shall "conform to any Town Master Plan" and "the Commission in requiring the provision of open space shall consider the proper development of the Town . . . ." The Monroe Plan of Development formulated in accordance with Connecticut General Statutes Section 8-23 specifically provides for recreation and open space. In relevant part, that plan provides that "[o]pportunities for passive and active recreation in locations accessible to residents, and preservation of the ecological balance and exhaustible natural resources of the area are

essential to continued health and economic well-being of the community." *See* Monroe Plan of Development at the section entitled Recreation and Open Space excerpt reproduced at A at 31a. Consistent with this general notion, the Town has set forth certain policies which are memoralized in its Plan of Development. The Town has decided that "[a] reasonable percentage of each subdivision should be permanently reserved for open space." *Id.* This "open space should be within [a] reasonable distance of all resident's [sic] homes and major centers of employment." *Id.* And, "[t]he Town should adopt a schedule of open space acquisition, preserving outstanding features, such as brooks and streams, providing for activities such as walking, skating, bicycling and riding, and reserving land topographically unsuited for intensive development." *Id.*

C. Applicability of Facts to Law.

Petitioner came to the Town with an application to convert virgin property into a ten-lot subdivision, thereby presenting the very real scenario that the ecological and aesthetic nature of that property would be changed dramatically and that the population density for that area and the concurrent drain on municipal resources would be increased by as many as ten families. In each of his four applications he filed with the planning and zoning commission, Petitioner filed a map depicting his planned subdivision and identified a single, nonconforming lot which Petitioner indicated would be deeded to Respondent. After the fourth application was approved in 1986, Petitioner voluntarily conveyed the nonconforming lot to Respondent. From 1976 through 1992, Petitioner never contested or challenged the land dedication issue. The open space requirement was, in every sense of the colloquialism, "a non-issue"—never challenged, never refuted, virtually never mentioned.[17]

[17] Indeed, as noted *supra* at note 9, the land dedication in the original application was not apparently made in response to Section

The open space was important because it satisfied the Town's interest of providing an aesthetic and ecological balance for the area (including the need for light and air) as well as providing area suitable for parks and recreation. In keeping with Section 3.4 and the Plan of Development, the land dedication provided the Town residents, including the purchasers of the individual lots in the subdivision, with the opportunity for "passive and active recreaton in a location accessible to residents" with the security of knowing that the "ecological balance and the exhaustible natural resources of the area, which were essential to the health and the economic well-being of the community" had been preserved. *See* Plan of Development at A at 31a.

Open space requirements are nothing new. In *Agins v. City of Tiburon*, 447 U.S. 259 (1980), this court upheld a municipal open space ordinance which restricted the development of certain land against an unconstitutional taking claim. In so doing, it noted the ordinance was grounded in the *City of Tiburon's* finding that "[i]t is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards related to geology, fire and flood, and other demonstrated consequences of urban sprawl." *Agins*, 447 U.S. at 261 n.8. Connecticut has similarly recognized that open-space ordinances are constitutional. *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 119, 273 A.2d 880, 886 (1970). *See* also R. Fuller, *Land Use Law and Practice*, at 188-89 (West 1993), citing *Aunt Hack Ridge Estates, Inc.*, 106 Conn. at 118, 273 A.2d at 995. ("A requirement that the developer dedicate open-space to the public is valid on the ground

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3.4 of the Monroe Zoning Subdivision Regulations but as an added incentive for the Town to approve the plan.

that the burden imposed on him is uniquely attributable to his own activity because the increase in population in the area which will result from that activity is productive of the need for open space.")

The open space dedication imposed upon Petitioner here was a condition which, in keeping with *Nollan*, had it not been satisfied, would have been a reason for denying a subdivision application. Under Connecticut General Statutes Section 8-25, "[n]o subdivision of land shall be made until a plan for such subdivision has been approved by the commission." Subdivision plans must conform with the Town's regulations, and the regulations shall provide that the commission may require the provision of open spaces, parks and playgrounds when, and in places, deemed proper by the planning commission, which open spaces, parks and playgrounds shall be shown on the subdivision plan." Conn. Gen. Stat. § 8-25. Here, the Town could have denied the application if it had not provided for open space, parks and playgrounds consistent with the Town's regulations and municipal plan. Therefore, in keeping with *Nollan*, the Town cannot be faulted for imposing the open space requirement on Petitioner.

Petitioner's argument that the lack of any development of the open space property shows that no important governmental goal has been achieved by the dedication is hollow. The land dedication condition is a valid restriction based on a legitimate governmental interest. Even if the land is never developed into a playground or park, the goals and objectives of the zoning regulations and municipal plan have been satisfied. The aesthetic and ecological nature of the property has been preserved. (Testimony of Daniel Tuba, Respondent's Zoning Enforcement Officer, July 15, 1993) (The land in question had become a "significant wildlife habitat. It was all open space, well forested. There was significant visual value to it . . . .") It remains as a passive area for enjoyment of Town residents, including primarily those situated most closely to it.

As importantly, no law requires the Town to develop immediately the property into a park, playground or anything else. Indeed, the Town may decide that the open space is best left in its pristine state. It may also come to pass that if the Town is required to build on one of its existing parks (e.g., to provide for additional school space), then the Town may look to this property to develop as an alternative.[18]

The above analysis thus takes this case out of the *Nollan* and *Dolan* line. In *Nollan*, the court found that the restriction in issue did not satisfy the California Coastal Commission's purported desire of providing visual access to the beach behind the Nollans' property for passers-by. The court quite correctly read through the rhetoric employed by the Commission and found there was no substance to the notion that providing visual access to passers-by of the beach behind the Nollans' property would help people understand that there was public access to the beach at some other location. Lowering this psychological barrier, the court concluded, would not help remedy the deterrent to public use of the beach or any additional fear of congestion on the beach caused by the construction of the Nollans' new house. *Nollan*, 483 U.S. at 835.

Here, Respondent, consistent with Connecticut General Statutes Section 8-25, its regulations and its Plan of Development, required a developer who sought to turn raw acreage into a ten-lot subdivision, and who in turn would profit by the amenities the Town would provide to the families in these new homes, to set aside a small portion to satisfy the Town's interest in maintaining a proper esthetic and recreational balance. The open space requirement is directly related to this interest.

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[18] Part of the justification for open space requirements rests on the burden the subdivision imposes on the existing town amenities. *Aunt Hack Ridge Estates, Inc.*, 160 Conn. at 118, 273 at 885. If and when the town needs to enhance its amenities because of increased population, open space provides it with the basis to do so.

In *Dolan*, the court found that the City's desires to prevent flooding along the Fanno creek and reduce traffic congestion were legitimate public purposes for which a condition could be imposed. In *Dolan*, the community development code required a landowner to leave fifteen percent of his or her property as open space for the flood plain. Where the City in *Dolan* went wrong, however, was in failing to demonstrate why it was necessary to have the flood plain property converted to public property as opposed to private property. Further, the City made no demonstration of why a pathway easement was necessary to reduce congestion even though that was a legitimate state purpose.

In this case, unlike *Dolan*, Petitioner's subdivision would necessarily intensify the development area in which it is located by adding ten families. Those ten families would, in turn, drain the resources of the municipality by adding more people to the existing parks and recreational areas. The subdivision itself would detrimentally impact the ecological and aesthetic balance of the property in relation to other properties in the Town. It was therefore reasonable for the City to impose a ten percent requirement for open space.

Under *Dolan*, the Court is required to assess the ten percent open space requirement in light of the rough proportionality test enunciated in that decision. Mr. Tuba, the planning and zoning officer for the Town of Monroe, testified at trial that the approximate ten percent land dedication requirement is applied to all major subdivisions greater than ten acres or ten lots. (Testimony of Daniel Tuba, July 15, 1993.) In this case, the ten-acre set-aside consisted of a slightly greater than one acre lot which was non-conforming because of inadequate road frontage. The Town decided that the set-aside was roughly proportional and rationally related to its interest in providing open space for the Town residents, not only those located near that subdivision but also all other Town residents. Ob-

viously, as the court in *Dolan* stated, no exact number can be assessed. Certainly, when one is talking about a subdivision of greater than ten acres or ten lots, a ten percent set-aside bears a rough proportionality to the stated interest.[19]

III. THE BURDEN OF PROOF WAS PROPERLY ASSIGNED TO PETITIONER GIVEN THE FACTS OF THIS CASE AND, EVEN IF IT WERE LOST, RESPONDENT INTRODUCED SUFFICIENT EVIDENCE TO MEET ITS BURDEN.

Petitioner argues that *Dolan* imposes upon a municipality the burden of proof of showing a rough proportionality between the condition it imposes on an applicant and the legitimate governmental purpose which it seeks to accomplish. *Dolan* does indeed impose the burden on the Town under the facts of that case. Having said that, however, Petitioner is still not entitled to relief.

The standard of proof in *Nollan* and *Dolan* are inapposite to this case because of the nature of Petitioner's claim. In those cases, the aggrieved parties filed direct appeals of the unconstitutional conditions included in their permits. The burden of proof was shifted to the governmental authorities to show how they justified the conditions. Here, Petitioner never challenged the open space requirement as part of the application approval process. Indeed, he voluntarily chose which property he wanted to give to the Town, with absolutely no input by the Town. He chose the amount, the location and the configuration of the open space.

After indicating that he would give that land to the Town in four separate applications, after having given

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[19] Petitioner is hard-pressed to complain about this set-aside since it was he who in 1976 decided how much and which property he was going to give the Town. If it was Petitioner's decision in 1976 to offer this particular lot, how can he now challenge the Town's acceptance of it as being roughly proportional to the interest the Town was trying to advance?

that land without objection, and after waiting for six years to raise any claim, Petitioner, in effect, requested the return of the land as part of a constructive trust counterclaim filed in an unrelated tax foreclosure. Since he chose that route as opposed to simply challenging the application, he properly bears the burden of proof of demonstrating the elements of this claim, including showing that his conduct was motivated by imposition and duress. *Worobey v. Sibieth,* 136 Conn. 352, 356, 71 A.2d 80, 81 (1949); *Spatola v. Spatola,* 4 Conn. App. 79, 81, 492 A.2d 518, 519 (1985). He tried to do that by demonstrating that the zoning regulations amounted to extortion. He failed. He cannot look to *Dolan* to rescue him from the insufficiency of his proof. Neither *Dolan* nor any other decision of this Court holds in this context that a municipal authority, when confronted with a constructive trust claim, must offer evidence to show that its conduct was not unconstitutional such as to give rise to a duress and imposition claim. It simply is not the law.

Moreover, Petitioner never raised his claim about who properly bore the burden of proof in the trial court or appellate court. In essence, having proceeded to assume the burden in the trial court of demonstrating that there was no basis for the land dedication, he wants to have the trial repeated to impose the burden on the Town to show that there was. However, since he chose not to pursue the issue at trial, he cannot now be heard to complain.

Finally, there is no reason to retry this case simply to reassign the burden of proof even if it were proper for the Town to shoulder that burden. The Town offered more than sufficient proof to demonstrate the basis upon which it imposed the land dedication requirement and arrived at the rough proportionality of ten percent. It produced documentary proof both in the form of its zoning regulations and plan of development as well as the testimony of its zoning enforcement officer. In short, the Town's proof, whether it bore the burden or not, satisfies the *Nollan* and *Dolan* tests, to the extent that they apply at all.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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